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January 12, 2015

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

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OFFICE OF GENERAL
COUNSEL

Re: Response of Elizabeth Cheney and Cheney for Wyoming in MUR 6888

Dear Mr. Jordan,

This response to the Complaint designated Matter Under Review 6888 is submitted on behalf of Elizabeth Cheney and Cheney for Wyoming by the undersigned counsel. American Democracy Legal Fund filed the Initial Complaint in this matter on or about October 15, 2014, and then filed a Supplemental Complaint naming additional respondents on or about October 28, 2014. Elizabeth Cheney and Cheney for Wyoming were identified as respondents in the supplemental complaint.

Factual Background

Ms. Cheney ended her campaign for U.S. Senate on January 6, 2014. Her campaign committee, Cheney for Wyoming, filed its termination report on April 8, 2014, and the Commission approved the committee's termination on May 9, 2014.

The narrative portion of the Complaint does not once mention Ms. Cheney, Cheney for Wyoming, or any activities undertaken by either. Cheney for Wyoming is included as a respondent only because the Complainant found four disbursements from Cheney for Wyoming to i360, LLC, in the committee's FEC reports. These four disbursements, totaling \$2,175, are listed below:

<u>Date</u>	<u>Amount</u>
10/01/2013	\$950
10/30/2013	\$350
12/29/2013	\$350
01/08/2014	\$525

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The Complainant does not purport to have any information regarding how Cheney for Wyoming used the i360 database. Cheney for Wyoming obtained the services of i360 through Demeter Analytics Services, Inc. ("Demeter"), although payments for these services were made directly to i360. In July 2013, Cheney for Wyoming entered into a contract with Demeter for the provision of "data, data services, and action management software." Pursuant to this contract, Cheney for Wyoming gained access to the names, addresses, and phone numbers of Wyoming's registered Republican voters. Cheney for Wyoming used this list of registered Republican voters to mail solicitations and invitations for campaign events. (These solicitations and invitations were *not* created, produced, or distributed by Demeter or i360.) Additionally, Demeter managed Cheney for Wyoming's donor database. ~~Cheney for Wyoming did not return any updated or enhanced data to Demeter or i360.~~

Cheney for Wyoming did not have access to any "non-public strategic campaign and party data" through i360, nor did it use any such data. Supplemental Complaint at 5. Cheney for Wyoming did not provide any campaign data to i360. Accordingly, Cheney for Wyoming was not involved in any "exchange of non-public, strategically material data through a common vendor," nor did it "pass[] on crucial, nonpublic voter information to i360's other ... clients." *Id.* at 6-7.

Analysis

The Complaint does not identify a single public communication that was allegedly coordinated with Cheney for Wyoming.¹ At page 8 of the Supplemental Complaint, the Complainant refers to advertisements produced by Americans for Prosperity that allegedly referenced two specific Senators and alleges that their opponents were clients of i360, LLC. The Complaint does not contain any such reference to any advertisement referencing Ms. Cheney or an opponent of Ms. Cheney. Thus, the Complaint does not allege facts indicating that either the payment prong (11 C.F.R. § 109.21(a)(1)) or the content prong (11 C.F.R. § 109.21(c)) is satisfied with respect to Cheney for Wyoming.

The facts alleged also do not indicate that the conduct prong (11 C.F.R. § 109.21(d)) is satisfied. Rather, with respect to Cheney for Wyoming, the Complaint alleges the *existence* of a possible "common vendor," and concludes in purely speculative fashion that impermissible coordination occurred. (i360 may not satisfy the Commission's definition of a "common vendor." To the best of our knowledge, i360 does not "create, produce, or distribute" public communications on behalf of clients. *See* 11 C.F.R. § 109.21(d)(4)(i).) Even if i360 qualifies as a "common vendor" under 11

¹ We identified only one independent expenditure made in connection with the U.S. Senate election in Wyoming during the period Ms. Cheney was a candidate (July 16, 2013 – January 6, 2014). American Principles Fund reported making expenditures for a television ad *opposing* Ms. Cheney on October 8, 2013. There was no applicable electioneering communications window during the period of Ms. Cheney's candidacy, and this period was also more than 90 days before the primary election. Accordingly, no other (known) reported communications would have satisfied the content standards at 11 C.F.R. § 109.21(c).

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C.F.R. § 109.21(d)(4), the mere existence of a common vendor does not violate any provision of the Act or Commission regulations, nor does it create a presumption of coordination. See Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 436 (Jan. 3, 2003) (explaining that the Commission “disagrees with those commenters who contended the proposed standard created any ‘prohibition’ on the use of common vendors, and likewise disagrees with the commenters who suggested it established a presumption of coordination.”); see also MUR 6050, First General Counsel’s Report at 9 (“the use of a common vendor, in and of itself, has not been found by the Commission to be sufficient to meet the ‘conduct’ prong of the coordination test”). The Complaint does not identify any person or entity with whom Cheney for Wyoming allegedly coordinated through i360, LLC, as a common vendor. The Complaint does not identify any public communication that was allegedly distributed in coordination with Cheney for Wyoming. There are no specific factual allegations in the Complaint to refute.

The Complaint does not contain a specific allegation of wrongdoing against Ms. Cheney or Cheney for Wyoming, and does not allege any facts that, *if true*, would constitute a violation of the Act. As the Commission has previously explained, it “may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . . Unwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true.” MUR 4960 (Clinton), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1-2; see also MUR 5878 (Arizona State Democratic Central Committee), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 5 (quoting MUR 4960); MUR 5467 (Moore), First General Counsel’s Report at 5 (quoting MUR 4960).

“The RTB standard does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges.” MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 6, n.12. “[O]pening an investigation to determine whether we could discover a basis for those suspicions runs counter to the statutory constraints imposed on the Commission.” MUR 6296 (Buck), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4.

With respect to the activities of Cheney for Wyoming, the Complaint makes *no* specific allegations, and only generally alleges impermissible coordination. This general allegation is not supported by any actual evidence and is a purely speculative, unsupported legal conclusion. As three Commissioners observed in another matter, “if this complaint sufficed to find reason to believe that coordination occurred and thereby launch a federal investigation, it is hard to imagine any allegations, no matter how

unsubstantiated, that would not trigger the reason to believe threshold." MUR 6296 (Buck), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 1.

Conclusion

For the reasons set forth above, the Commission should quickly dismiss this Complaint against Elizabeth Cheney and the now-terminated Cheney for Wyoming.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Josefiak', written over a horizontal line.

Thomas J. Josefiak
Michael Bayes

Counsel to Elizabeth Cheney and
Cheney for Wyoming